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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

DATE: OCT 07 2011 OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Jerry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner claimed on the Form I-129 to be engaged in the wholesale distribution business, with 41 employees and a gross annual income of \$10 million. It seeks to employ the beneficiary as an international sales management specialist pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the basis of her determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition.

The sole issue before us on appeal is whether the proposed position qualifies for classification as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [1] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In its June 29, 2009 letter of support, the petitioner stated that the beneficiary's responsibilities would include the following duties:

- Researching market trends as part of a team with the petitioner's upper management, advertisers, and outside market analysts;
- Researching the market potential for various Asian food product lines;
- Establishing research methodology and design format for gathering relevant data;
- Collecting and analyzing data in order to evaluate markets and forecast future marketing trends in Central and Northern California, and Nevada;
- Analyzing competitors' marketing strategies and alerting management to areas where competitive pressure may require action;
- Maintaining vendor relationships;
- Assisting in the negotiation of wholesale prices for products; and
- Providing marketing input into the design of web pages and other content.

In making our determination as to whether the proposed position qualifies as a specialty occupation, we turn first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a resource upon which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner contends that the duties of the proposed position align with those of a management analyst, as the duties of that occupation are described in the *Handbook*. In pertinent part, the *Handbook* states the following regarding management analysts:

As business becomes more complex, firms are continually faced with new challenges. They increasingly rely on *management analysts* to help them remain competitive amidst these changes. . . .

For example, a small but rapidly growing company might employ a consultant who is an expert in just-in-time inventory management to help improve its inventory-control system. In another case, a large company that has recently acquired a new division may hire management analysts to help reorganize the corporate structure and eliminate duplicate or nonessential jobs. . . .

Management analysts might be single practitioners or part of large international organizations employing thousands of other consultants. Some analysts and consultants specialize in a specific industry, such as healthcare or

telecommunications, while others specialize by type of business function, such as human resources, marketing, logistics, or information systems. In government, management analysts tend to specialize by type of agency. The work of management analysts and consultants varies with each client or employer and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

Both public and private organizations use consultants for a variety of reasons. Some lack the internal resources needed to handle a project, while others need a consultant's expertise to determine what resources will be required and what problems may be encountered if they pursue a particular opportunity. To retain a consultant, a company first solicits proposals from a number of consulting firms specializing in the area in which it needs assistance. These proposals include the estimated cost and scope of the project, staffing requirements, references from previous clients, and a completion deadline. The company then selects the proposal that best suits its needs. Some firms, however, employ internal management consulting groups rather than hiring outside consultants.

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem that they have been asked to solve. During this phase, they analyze relevant data—which may include annual revenues, employment, or expenditures—and interview managers and employees while observing their operations. The analysts or consultants then develop solutions to the problem. While preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture. Insight into the problem often is gained by building and solving mathematical models, such as one that shows how inventory levels affect costs and product delivery times.

Once they have decided on a course of action, consultants report their findings and recommendations to the client. Their suggestions usually are submitted in writing, but oral presentations regarding findings are also common. For some projects, management analysts are retained to help implement their suggestions.

Handbook, 2010-11 ed., available at <http://www.bls.gov/oco/ocos019.htm> (last accessed September 27, 2011). We disagree with the petitioner's assertion that these duties align with those

of the proposed position.¹ Nor do we agree with the director's characterization of the duties as analogous to those of sales representatives.²

In reaching our conclusion regarding the degree requirements of the petitioner's proposed position, we have compared the position's proposed duties against those described for a range of occupations. Our review has found that virtually all of the proposed position's duties are listed among those described for market research analysts and marketing managers. In pertinent part, the *Handbook* states the following regarding market research analysts:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. . . .

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

Id. at <http://www.bls.gov/oco/ocos013.htm>. The *Handbook's* discussion regarding the duties of marketing managers also relates to the petitioner's proposed position, as follows:

Advertising, marketing, promotions, public relations, and sales managers coordinate their companies' market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities. In small firms the

¹ Even if we agreed with the petitioner's characterization of the duties of its proposed position as essentially those of a management analyst, the position would still not qualify for classification as a specialty occupation, as the *Handbook* does not indicate that such positions normally require a bachelor's degree *in a specific specialty* as a minimum entry requirement. *See id.* at <http://www.bls.gov/oco/ocos019.htm>.

² *See id.* at <http://www.bls.gov/oco/ocos119.htm>.

owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. . . .

* * *

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

Id. at <http://www.bls.gov/oco/ocos020.htm>. As indicated, the duties of the proposed position combine those of market research analysts and marketing managers as those positions are described in the *Handbook*. Having made that determination, we turn next to the *Handbook's* discussion of the educational credentials necessary for entry into these occupations.

The *Handbook* does not indicate that entry into market research analyst positions normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. *See id.* This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states the following: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities." *Id.* at <http://www.bls.gov/oco/ocos013.htm>.

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion located in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business

administration, marketing, statistics, communications, or other closely related disciplines.

Id. Because the *Handbook* indicates that entry into this field does not normally require a degree in a specific specialty, it does not support the proposed position as being a specialty occupation. With regard to the education and training requirements for marketing managers, the *Handbook* states the following:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

* * *

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Id. at <http://www.bls.gov/oco/ocos020.htm>. Although a bachelor's degree in business administration may be preferred, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty is normally required for marketing and advertising managers.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proposed position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

As discussed, we have determined that virtually all of the proposed position's duties are listed in the *Handbook* among the occupations of market research analysts and marketing managers. Our review

has found that none of these occupations impose a normal minimum entry requirement of a bachelor's degree in a specific field of study as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). For all of these reasons, we find that the petitioner has failed to demonstrate that its proposed position qualifies for classification as a specialty occupation under the requirements of the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree *in a specific specialty*. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

In order to determine whether the petitioner's degree requirement is common to the industry in parallel positions among similar organizations, we have reviewed the letters from ██████████

██████████ Both individuals describe their organizations as wholesale Japanese restaurant supply companies. Both individuals describe the duties proposed by the petitioner for the beneficiary, and both state that "the minimum requirement for the position offered by our company is a Bachelor's degree in Economics, Business Administration, Marketing, or other related field. These letters, therefore, support the findings of the *Handbook*, as reported above, that an individual possessing a degree in a range of fields could perform the duties of the proposed position. They do not indicate that a minimum of a bachelor's degree in a specific specialty is normally required. These letters, therefore, do not establish the proposed position as a specialty occupation. Moreover, we note that the language used in these letters is nearly identical, which therefore calls into question their actual authorship and diminishes their probative value.

For all of these reasons, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The duties of the proposed position are similar to those of market research analysts and marketing managers as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement for those positions. The duties proposed by the petitioner are no more complex or unique than those outlined by the *Handbook*; to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The duties discussed by the petitioner appear no more unique, complex, or specialized than those discussed in the *Handbook*. The evidence of record does not refute the *Handbook*’s information indicating that a bachelor’s degree from a specific field of study is not the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate it normally requires a degree or its equivalent for the position. To determine a petitioner’s ability to meet the third criterion, we normally review the petitioner’s past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas.³ However, the record in this case contains no such evidence.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of its proposed position’s duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those of market research analysts and marketing managers, neither of which require nor are usually

³ Even if a petitioner believes or otherwise assert that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner’s claimed self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner’s degree requirement is only symbolic and the proposed position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “specialty occupation”). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

associated with at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.